



## **CONSENT TO ARBITRATION AND THE LEGACY OF THE *SPP V. EGYPT* CASE**

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### **ABSTRACT**

The aim of this article is to identify the main principles governing the interpretation of domestic law clauses that grant jurisdiction to ICSID arbitration and to analyse the meaning of such provisions in the context of the *SPP v. Egypt* case as the first case on the issue. The article first examines the peculiarities of consent to ICSID jurisdiction by way of national legislation. In the first part the analysis of the practice of arbitral tribunals in which a claim was introduced on the basis of consent to arbitration in domestic law shows that specific language of national legislation on consent to arbitration varies considerably. Therefore, since consent is the “cornerstone” of the Centre’s jurisdiction, arbitral tribunals recognize that not all references to ICSID arbitration in national legislation amount to consent. They approach the task of ascertaining the existence of such consent with great care. In the second part, the article focuses on the *SPP v. Egypt* case on the issue and analyses challenges that the tribunal met in interpreting relevant national clauses and establishing the consent to arbitration. Finally, this article discusses the legacy of interpretation standard of *SPP v. Egypt* case in context of the dissenting opinion and further case law. It is argued that the rules of interpretation of domestic law clauses that grant jurisdiction to ICSID arbitration are conditioned by the sui generis nature of consent to arbitration as unilateral declarations capable of giving rise to international legal obligations. Therefore, for the purpose of

establishing whether there is consent to arbitration provided in national legislation, international tribunals reasonably take a balanced approach and use the methodological mix of rules of interpretation involving various sources: the VCLT, customary law principles governing unilateral declarations and domestic legislation. Additionally, this article provides suggestions on the possible role of the Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations (Guiding principles) in interpreting domestic provisions containing an offer to arbitrate before ICSID.

**KEYWORDS**

Investment arbitration, consent to arbitration, International Centre for Settlement of Investment Disputes, *SPP v. Egypt* case

## INTRODUCTION

The state's consent to arbitration before the International Centre for Settlement of Investment Disputes (ICSID) included in its national legislation is considered one of the standards of protection for investors granted by states in their domestic laws.

Today domestic laws have been largely overtaken by BIT's as the preferential legal mechanism for the protection of foreign investment. However, the possibility to establish consent to arbitration through domestic investment legislation is recognised as one of the possible ways to consent to arbitration under ICSID convention and still some jurisdictions include references to ICSID convention in their respective national investment laws.<sup>1</sup>

Taking into account that those national laws raise their own legal issues as far as the consent provided in the domestic laws is considered a unilateral act by the state which can not be interpreted in the same way as investment treaties, it is necessary to examine what the specific ways to interpret such national provisions are.

The practice of arbitral tribunals in which a claim was introduced on the basis of consent to arbitration in domestic law shows that specific language of national legislation on consent to arbitration varies considerably.<sup>2</sup> There is not unified opinion on how such clauses should be interpreted in academic articles too.<sup>3</sup> Since consent is the "cornerstone" of the Centre's jurisdiction, arbitral tribunals recognize that not all references to ICSID arbitration in national legislation amount to consent. They approach the task of ascertaining the existence of such consent with great care.

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<sup>1</sup> See, for example, El Salvador's Foreign Investment Law, which was in detailed examined by the ICSID tribunals in *Zhinvali Development Ltd v. Republic of Georgia* and in *Inceysa Vallisoletana v. El Salvador* cases; Article 8(2) of the Albania's Foreign Investment Law of 1993, examined by the tribunal in *Tradex Hellas v. Albania* case; Article 16 of Georgia's Investment Law, examined in *Zhinvali Development Ltd v. Republic of Georgia* case; Article 22 of Venezuela's Foreign Investment Law, examined in *CEMEX v. Venezuela* and *Mobil v. Venezuela* cases, etc.

<sup>2</sup> See, for example, *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008); *Tradex Hellas (Greece) v. Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (December 24, 1996); *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008); *Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3; *Zhinvali Development Ltd v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (January 24, 2003); *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010); *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (December 30, 2010); etc.

<sup>3</sup> See, for example, Yulia Andreeva, "Consent to Arbitration as a Unilateral Act of State: In Search for a Non-Conventional Approach Towards Treaty Interpretation"; in: Todd Weiler, ed., *Investment Treaty Arbitration and International Law*, Vol. 3 (JurisNet LLC, 2010); David Caron, "The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law"; in: Mahnouch Arsanjani and Jacob Katz Cogan, eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Robert Sloane & Siegfried Weissner, 2011); Michele Potesta, "The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws," *Arbitration International* 27 (2011).

Thus, the aim of this article is to identify the main principles governing the interpretation of domestic law clauses that grant jurisdiction to ICSID arbitration provided in academic papers and arbitration as well to analyse the application of such principles in particular in context of the *SPP v. Egypt* case as the first and leading case on the issue.

The article first examines the peculiarities of consent to ICSID jurisdiction by way of national legislation. In second part, it focuses on the *SPP v. Egypt* case on the issue and analyses challenges that the tribunal met in interpreting relevant national clauses and establishing the consent to arbitration. Finally, this article discusses the legacy of interpretation standard of *SPP v. Egypt* case in context of the dissenting opinion and further case law. Besides, it provides suggestions on the possible role of the Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations (Guiding principles)<sup>4</sup> in interpreting domestic provisions containing an offer to arbitrate before ICSID.

## 1. SCOPE OF CONSENT TO ARBITRATION IN NATIONAL LEGISLATION

Consent to ICSID jurisdiction may be given in different ways. One option is as a provision in the host state's national legislation offering ICSID arbitration to foreign investors.

Some national legislation laws contain unequivocal provisions for dispute settlement by ICSID.<sup>5</sup> Some provide reference to ICSID as one of several possible means of dispute settlement. There are also jurisdictions that require a specific agreement between the host state and the investor contained in an investment agreement, an investment license or another document.<sup>6</sup>

The most problematic are cases in the so-called "gray area": with national provisions that are less clear and may raise serious doubts whether or not the state has expressed its consent to arbitration. Cases that fall under this "gray area" may include legislation by which the host country's legislator simply informs possible foreign investors that the state is a party to the ICSID convention. There may be national provisions providing that the "foreign investor" shall be entitled to request that the dispute be finally settled by one of several methods including the ICSID

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<sup>4</sup> *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, United Nations, International Law Commission, Report of the 58th Session, UN Doc. A/61/10 (2006) // [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_9\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf) (accessed June 30, 2014).

<sup>5</sup> For example, Article 8(2) of Albania's Foreign Investment Law in *Tradex Hellas (Greece) v. Albania*, *supra* note 2, 186–187.

<sup>6</sup> In *Tradex Hellas (Greece) v. Albania* case tribunal found that Albania had 'unambiguously' consented to the jurisdiction of the Centre by way of that legislative provision (*ibid.*, 171–178).

convention, or that the dispute "shall be settled" by one of these different methods."<sup>7</sup>

Those ambiguous provisions require careful analysis and precise interpretation. In order to identify possible rules of interpretation for solving difficulties that arise, in the following part of this article the examination of the first famous *SPP v. Egypt*<sup>8</sup> case will be provided and further developments on the interpretation of national legislation will be discussed.

## 2. INTERPRETATION OF INVESTMENT PROVISIONS IN NATIONAL LEGISLATION: *SPP V. EGYPT* CASE STUDY

### 2.1. THE RELEVANT FACTS OF THE CASE

In 1974, Southern Pacific Properties (SPP), a Hong Kong company, entered into agreements with Egypt to establish a joint venture (ETDC) with a purpose to develop an international tourist complex at the Pyramids Oasis in Egypt. The dispute originated in 1978 when, as a result of parliamentary opposition, Egypt cancelled the project placing ETDC in judicial trusteeship.

Pursuant to the contractual arbitration clause, SPP commenced ICC arbitration, and obtained an award in damages. The Paris Court of Appeal annulled the ICC award on the ground that Egypt was not a party to the investment agreement. The latter decision was referred to the French Court of Cassation.

In 1984 SPP filed a request for arbitration at ICSID, asking for relief in the same matter. That arbitration was initiated pursuant to the Egyptian Law No. 43 Article 8 which provided for the settlement of disputes in accordance with the agreement of the parties, or failing such agreement, with the provisions of bilateral investment treaties, or in their absence under the ICSID convention.<sup>9</sup>

According to SPP, this reference to ICSID arbitration constituted Egypt's consent to have recourse to this method of dispute settlement. Egypt argued that such a provision in national law was not a sufficient basis for the Centre's jurisdiction. Egypt countered that the reference was merely illustrative of several dispute resolution alternatives, the selection of which required further agreement between the parties. The tribunal dealt with the objections to the jurisdiction of ICSID in two decisions.

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<sup>7</sup> Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford: OUP, 2012), p. 200.

<sup>8</sup> *Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt case, supra* note 2, Decision on Jurisdiction (27 April 1985), 3 ICSID Rep. 112 ("Decision on Jurisdiction I"), and Decision on Jurisdiction (14 April 1988), *ibid* 131 ("Decision on Jurisdiction II").

<sup>9</sup> See for full text of Article 8 in Annexure.

By its first decision on jurisdiction, dated 27 November 1985, the tribunal decided to stay the proceeding until the French courts finally resolved the question of whether the parties agreed to submit their dispute to the jurisdiction of ICC. In 1987 the French Court of Cassation finally upheld the decision of the Court of Appeal. After this, the ICSID tribunal carefully analysed Article 8 of Egypt's Foreign Investment Law and on April 14, 1988 decided to uphold its jurisdiction. In 1989, a new Egyptian Law on investments was adopted which established a provision requiring specific additional agreement of the parties for ICSID arbitration.

The dispute ended with the tribunal's decision in 1992, in which Egypt was held liable to pay equitable compensation for the value of the expropriated investment.

## **2.2. CHALLENGES THE TRIBUNAL HAD TO FACE IN INTERPRETING NATIONAL LAW**

### **2.2.1. APPLICABLE LAW**

The first matter with which the tribunal dealt in *SPP v. Egypt* case was the applicable law to the consent to arbitration provided for in the national legislation. The tribunal recognised that consent to arbitration should be treated as a unilateral declaration capable of giving rise to an international legal obligation. It decided that the issue in this case was "whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty".<sup>10</sup>

The tribunal decided that the interpretation of the host state of its legislation is to be given considerable weight, but it cannot control the tribunal's decision as to its own competence. Taking into account that Law No. 43 is not the result of negotiations between two or more states, but rather the result of unilateral act by a single state, the tribunal stated that "to the extent that Article 8 is alleged to be a universal declaration of acceptance of the Centre's jurisdiction, subject to reciprocal acceptance by a national of another contracting state, the tribunal must also consider certain aspects of international law governing unilateral juridical acts."<sup>11</sup>

The tribunal concluded that the applicable law by which it shall determine whether national statute provided for consent to ICSID jurisdiction would be "general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretations and principles of international law applicable to unilateral declarations".<sup>12</sup>

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<sup>10</sup> *Ibid.*, para 61.

<sup>11</sup> *Ibid.*, para 61.

<sup>12</sup> *Ibid.*, para 60.

### 2.2.2. RULES OF INTERPRETATION PROVIDED BY THE TRIBUNAL IN FINDING CONSENT TO ARBITRATION

The second issue for the tribunal was whether the provision referring to ICSID in national legislation was capable of constituting consent to jurisdiction. Firstly, the tribunal recognized that the starting point in statutory interpretation shall be the ordinary or grammatical meaning of the terms used. Secondly, the tribunal decided that "jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if—but only if—the force of the arguments militating in its favour is preponderant."<sup>13</sup> At this stage, the tribunal concentrated on a detailed grammatical analysis of relevant text, including Arabic original, and tried to find whether the reference to ICSID jurisdiction is formulated in mandatory terms or, on the contrary, subject to a further manifestation of will by the state.

In this respect, the tribunal took into consideration the particular usage of the verb phrase "shall be settled" as opposed to "may be". The tribunal found that the ordinary grammatical meaning of the words "shall be settled" was mandatory on its face, and it was undisputed that the Arabic word from which it was translated meant "shall be/will be". The tribunal relied on the dictum of the ICJ<sup>14</sup> and concluded that such expression mandated the submission of disputes to the various methods prescribed therein (as opposed to making them purely optional and subject to a further consent by the state).<sup>15</sup>

Thirdly, the tribunal rejected Egypt's contention that national legislation required the execution of a separate agreement to establish consent to Centre's jurisdiction. In the tribunal's opinion, such a requirement would "destroy the internal logic of art 8 and render much of that provision superfluous".<sup>16</sup> The tribunal also rejected the idea that Article 8 had the consequence only of informing potential investors of Egypt's willingness to negotiate a consent agreement.

Fourthly, with respect to the question of priority among the various methods of dispute settlement, the tribunal found that there was a hierarchical relationship indicated by a movement from the more specific to the more general. It concluded that Article 8 constitutes an express "consent in writing" to ICSID jurisdiction "in those cases where there is no other agreed-upon method of dispute settlement and no applicable bilateral treaty."<sup>17</sup>

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<sup>13</sup> *Ibid.*, para 63.

<sup>14</sup> *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, ICJ Rep 150 [1960] (June 8, 1960), 159.

<sup>15</sup> *Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt case*, *supra* note 8, paras 74–82.

<sup>16</sup> *Ibid.*, para 94.

<sup>17</sup> *Ibid.*, para 116.

Since the parties had not agreed on another method of dispute resolution and since there was no applicable bilateral treaty in force, the tribunal found "that Article 8 of Law No. 43 operates to confer jurisdiction upon the Centre with respect to the Parties' dispute."<sup>18</sup>

### 3. FURTHER DEVELOPMENTS AND THE LEGACY OF THE INTERPRETATION STANDARD OF THE *SPP* CASE

In its dissenting opinion in *SPP v. Egypt* case, Judge Dr El Mahdi argued that since an investment law is part of the legislation of a state, a clause included therein should be construed in light of the interpretative principles of that state.<sup>19</sup> As to the interpretation of a text of a national law, Judge Dr El Mahdi emphasised that the interpretation of a national provision must be undertaken on the basis of the original text of the law. The judge stated that the tribunal in the *SPP* case based its decision concerning jurisdiction upon erroneous translation. In the judge's opinion, reference to the ICSID convention in Article 8 is conditioned by the *proviso*: "in case the Convention applies", not "where it (i.e., the Convention) applies". The verb used in the Arabic text of Article 8 translated "shall" as "tatim" in Arabic "does not contain the mandatory effect eventually attributed to "shall" in the English language".<sup>20</sup> This led the judge to conclude that "Article 8 does not contain standing offer to submit *ipso facto* any investment disputes to ICSID arbitration."<sup>21</sup>

Judge Dr El Mahdi emphasised that the state's consent to submit itself to the ICSID jurisdiction is not to be presumed and but must be proven. In his opinion, "the claimants did not present evidence to the effect that Egypt consented in a clear unequivocal language to submit the present dispute to the jurisdiction of the Centre".<sup>22</sup>

The dissenting opinion and the arguments provided therein raise questions about the legacy of the rules of interpretation applied in *SPP v. Egypt* case. In the context of further developments of the case law of international tribunals and academic position on the issue, the interpretation standard of the tribunal applied in the *SPP v. Egypt* case in comparison with further developments in case law does not raise many doubts about its legacy.

Some academics argue that tribunals in such cases should distinguish between the existence and the scope of the consent to arbitrate, on one hand, and the validity or enforceability of the obligation to resort to international arbitration

<sup>18</sup> *Ibid.*, para 117.

<sup>19</sup> *Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt case*, Decision on Jurisdiction II, *supra* note 8, Dissenting opinion, 3 ICSID Rep. 112, para 12.

<sup>20</sup> *Ibid.*, para 24.

<sup>21</sup> *Ibid.*, para 24.

<sup>22</sup> *Ibid.*, para 31.



contained in municipal investment law, on the other. One has to determine whether there is an international obligation under domestic law, and only then can that obligation be treated as an obligation governed by international law.<sup>23</sup> However, the leading position is that "being a unilateral act under international law, such a foreign investment law has to be examined in light of the canons of interpretation to be found in international law."<sup>24</sup>

For the purpose of establishing whether there is consent to arbitration provided in national legislation, in international practice the arbitral tribunals usually use the methodological mix of the rules of interpretation involving treaty interpretation, statutory interpretation and general principles of contract law. Consequently, tribunals use various sources of the interpretation: national statutory rules, principles of customary international law, Vienna Convention on the Law of Treaties (VCLT) provisions, references to practice of ICJ and other international tribunals.

Firstly, as concerns the scope of applicability of national law in determining the consent to arbitration, the majority of arbitral tribunals, as the tribunal in *SPP v. Egypt* case, rejected purely national methods of statutory interpretation. Tribunals recognise the *sui generis* nature of consent to arbitration in national legislation and consider it as unilateral act that must be interpreted according to the ICSID Convention itself and the rules of international law governing unilateral declarations of states.

However, the practice of a tribunal still varies in its emphasis on domestic or international law. For example, in the *Zhinvali v Georgia* case a tribunal found that interpretation of state's consent was primarily governed by the law of Georgia, subject, however, to the control of international law.<sup>25</sup> In the *Mobil* and *CEMEX* cases tribunals took the view that when the consent of the State is contained in national law. The interpretation of such a unilateral act is governed by international law, but, in order to interpret the state's intent, domestic laws should also be taken into account.<sup>26</sup> In those cases tribunals put a strong emphasis on the intention of the State making the declaration and stated that 'the intention of the declaring State must prevail'.<sup>27</sup> The tribunals decided that "intention can be deduced from the

<sup>23</sup> Todd Weiler, ed., *Investment Treaty Arbitration and International Law*, Vol. 2 (JurisNet LLC, 2009), p. 125.

<sup>24</sup> Yulia Andreeva, *supra* note 3: 59–83.

<sup>25</sup> *Zhinvali Development Ltd v. Georgia*, *supra* note 2, 10 ICSID Rep. 3, para 337.

<sup>26</sup> *CEMEX Caracas Investment v. Venezuela*, *supra* note 2, para 89; *Mobil Corporation v. Venezuela*, *supra* note 2, para 96.

<sup>27</sup> *CEMEX Caracas Investment v. Venezuela*, *supra* note 2, para. 87.

text, but also from the context, the circumstances of its preparation and the purposes intended to be served".<sup>28</sup>

Secondly, it is recognised that the rules of the interpretation of unilateral declarations are not identical with that established for the interpretation of treaties by VCLT. However, most tribunals admit that the ICSID Convention may apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the court's jurisdiction. This approach results in an adoption of a good faith interpretation in accordance with the ordinary meaning to be given to the terms in their context and in light of the act's object and purpose, as it is stated on Article 31(1) of the VCLT. In addition, VCLT may be useful "to assess the intentions of the author of a unilateral act" by taking into account all the circumstances in which the act occurred".<sup>29</sup>

Thirdly, the tribunals also refer to the case law of both the PCIJ and ICJ on the interpretation of optional declarations of compulsory jurisdiction of the court made under Article 36(2) of the ICJ Statute. The tribunals recall in particular the rule that a unilateral declaration "must be interpreted as it stands, having regard to the words actually used".<sup>30</sup> Tribunals also refer to the rule that due consideration should be paid to the *intention* of the state having formulated such acts, which can be deduced from the "context" of the act, "the circumstances of its preparation" and the "purposes intended to be served".<sup>31</sup>

When in 2006 the International Law Commission adopted Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations, with commentaries thereto, international tribunals explicitly or implicitly refer to those guidelines as an additional source of interpretation, too. The main rules under the Guiding Principles that may be relevant are the following.

The Guiding principle 7 emphasizes the importance of textual analysis of unilateral declaration and declares that it "entails obligations for the formulating State only if it is stated in clear and specific terms".<sup>32</sup> The Guiding Principles require that weight be given to the "context and circumstances" in which the unilateral act was formulated and says that it is necessary to take account all the factual circumstances in which the declaration was made and "of the reactions to which they gave rise".<sup>33</sup>

<sup>28</sup> *Mobil Corporation v. Venezuela*, *supra* note 2, para 90, 94-95; *CEMEX Caracas Investment v. Venezuela*, *supra* note 2, para 87.

<sup>29</sup> *Frontier Dispute (Burkina Faso v. Mali)*, Judgment [1986] ICJ Rep. 554, para. 40.

<sup>30</sup> *Mobil Corporation v. Venezuela*, *supra* note 2, para 92.

<sup>31</sup> *Ibid.*, para 94.

<sup>32</sup> *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, *supra* note 4, para. 7.

<sup>33</sup> *Ibid.*

Eventually, the Guiding Principles say that in case of doubt unilateral declarations must be interpreted in a restrictive manner. This rule, as many other rules in Guiding Principles, was inspired by the judgments of ICJ, in particular the *Nuclear Tests* cases.<sup>34</sup>

It should be noted that the rule of restrictive interpretation has been identified by some academics as a “departure from the approach of the Vienna Convention to interpretation”.<sup>35</sup> Therefore, it is contestable whether the rule of restrictive interpretation may be applied to the state’s consent to arbitration provided in national legislation. It is necessary to take into consideration not only the state’s expression of consent to arbitration, but also “the foreign investor’s viewpoint – i.e. how the foreign investor could understand the consent to arbitration expressed by the host State”.<sup>36</sup>

The position of the arbitration tribunals on how consent to arbitration should be interpreted: restrictively or expansively also varies. For example, the arbitral tribunal in the *SOABI v. Senegal* case emphasised the need to take into account investors’ legitimate expectations<sup>37</sup>. In the *Tradex v. Albania* case the tribunal applied the doctrine of effective interpretation or so called extensive interpretation, recognizing that in the case of doubt national law should rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction.<sup>38</sup> However, most tribunals in recent decisions have applied a balanced approach to the interpretation of consent to arbitration that rejects both a presumption against or in favour of jurisdiction and take “neither broad nor restrictive approach”.<sup>39</sup> The same position was admitted in the *SPP v. Egypt* case as well.

## CONCLUSION

The interpretation standard of the tribunal applied in the *SPP v. Egypt* case in comparison with further developments in case law does not raise many doubts about its legacy. The rules of interpretation of domestic law clauses that grant jurisdiction to ICSID arbitration are conditioned by the *sui generis* nature of consent to arbitration as unilateral declarations capable of giving rise to international legal obligations.

The applicable law to consent to arbitration provided in national legislation involves not only general principles of statutory interpretation, but also relevant

<sup>34</sup> *Nuclear Tests cases (Australia v. France; New Zealand v. France)*, ICJ Rep 1974 267-8 (Merits) [1974], paras 44, 47.

<sup>35</sup> David Caron, *supra* note 3: 34.

<sup>36</sup> Marco Steingruber, *supra* note 7, p. 237.

<sup>37</sup> *SOABI v. Senegal*, ICSID Case No. Allli/82/1, Award (February 25, 1988), para. 4.10.

<sup>38</sup> *Tradex Hellas (Greece) v. Republic of Albania*, *supra* note 2, para. 194.

<sup>39</sup> *Mobil Corporation v. Venezuela*, *supra* note 2, paras 112–119; *CEMEX Caracas Investment v. Venezuela*, *supra* note 2, paras 104–115.

rules of treaty interpretation and principles of international law applicable to unilateral declarations.

For the purpose of establishing whether there is consent to arbitration provided in national legislation, international tribunals take a balanced approach and use the methodological mix of rules of interpretation involving various sources: the VCLT, customary law principles governing unilateral declarations and domestic legislation. The Guiding Principles acts may be a helpful guide in interpreting the state's consent to arbitration provided in national legislation. Taking into account the specific nature of domestic provisions containing an offer to arbitrate before ICSID and the need to take into consideration the legitimate expectations of the investors, a rule of restrictive interpretation in cases of doubt should not be applicable.

## ANNEXTURE

The request for arbitration was based on Article 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone.

An English translation of the text of Article 8 is provided in Decision on Jurisdiction II, para. 71. The translation reads:

Investment disputes in respect of the implementation of the provisions of this Law *shall be settled* in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where it (i.e., the Convention) applies.

Disputes *may be settled* through arbitration. An Arbitration Board shall be constituted, comprising a member on behalf of each disputing party and a third member acting as chairman to be jointly named by the two said members. Failing agreement on the nomination of the third member within thirty days of the appointment of the second member, the chairman shall be chosen, at the request of either party, by the Supreme Council of Judicial Bodies from among counsellors of the judiciary in the Arab Republic of Egypt.

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